

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	MM Docket No. 92-264
The Commission's Cable Horizontal)	
and Vertical Ownership Limits)	

TO: The Commission

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters ("NAB")¹ submits this reply to certain comments on the Commission's *Second Further Notice of Proposed Rulemaking* in this proceeding.² In the *Notice* (at ¶ 16), the Commission sought comment and empirical evidence to support the formulation of judicially "sustainable cable horizontal and vertical ownership limits," in light of the D.C. Circuit Court of Appeals' earlier reversal and remand of those limits.³ In addressing horizontal ownership limitations, NAB agrees with those commenters urging the Commission to analyze the anti-competitive effects of regional (as well as national) concentration by cable operators. And given past difficulties in formulating sustainable horizontal or vertical ownership limitations, the Commission could address its stated concerns about the ability of unaffiliated programming networks to obtain carriage from cable operators

¹ NAB is a nonprofit incorporated association of radio and television stations and broadcast networks. NAB serves and represents the American broadcasting industry.

² *Second Further Notice of Proposed Rulemaking* in MM Docket No. 92-264, FCC 05-96 (rel. May 17, 2005) ("*Notice*").

³ *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001).

by promoting other opportunities for unaffiliated programmers (such as those presented by multicasting broadcasters). NAB also points out that one commenter's repetitive and previously refuted complaints about the Commission's well-established retransmission consent rules have little or nothing to do with establishing sustainable limits on the number of subscribers a cable operator may serve and the number of channels a cable operator may devote to its affiliated programming networks.

I. The Commission Should Examine The Potential Anti-Competitive Effects Of Regional Concentration, Including Any Effects On Programming Providers.

In addressing horizontal ownership limitations, several commenters urge the Commission to analyze the anti-competitive effects of regional (as well as national) concentration by cable operators. *See, e.g.*, Comments of DIRECTV, Inc. at 1-6 (filed Aug. 8, 2005). As the Commission recognized, "cable horizontal concentration and regional clustering" have significantly increased in recent years. *Notice* at ¶ 49. Because the largest cable operators have "clustered" their systems, incumbent cable operators' shares of the multichannel video programming distribution ("MVPD") market have increased dramatically in many regions. Comments of DIRECTV at 4.⁴ NAB joins other commenters in stating their concern about the potentially significant adverse effects on competition in the video marketplace resulting from high levels of regional concentration. The Commission should therefore consider "a regional

⁴ In the Baltimore Designated Market Area ("DMA"), for example, Comcast's share of cable subscribers is 93 percent, and its share of MVPD subscribers is 76 percent. Even in less concentrated markets such as the Washington, DC DMA, Comcast has a 53 percent share of cable subscribers and a 38 percent share of MVPD subscribers. If Comcast is permitted to acquire the Adelphia cable systems as currently proposed, its share of the cable and MVPD markets will significantly increase in areas such as Washington, DC. *See* Petition of TCR Sports Broadcasting Holding, L.L.P. to Impose Conditions Or, in the Alternative, to Deny Part of the Proposed Transaction, MB Docket 05-192 at 14 (filed July 21, 2005) ("TCR Petition").

limit on concentration” as “better effectuat[ing]” the “statutory purposes set forth” in the 1992 Cable Television Consumer Protection and Competition Act (“Cable Act”). *Notice* at ¶ 70.⁵

Beyond the comments submitted in this proceeding, many parties opposing or commenting on the proposed transfer of Adelphia Communications to Time Warner and Comcast raised similar points about regional consolidation. A number of MVPDs (including satellite operators, small cable system operators and cable overbuilders), regional sports networks, cable programming networks and other media entities expressed concern about the increase in regional concentration that would result from the Adelphia transfer and the enhanced market power and dominant bargaining position that Time Warner and Comcast would possess vis-à-vis MVPD competitors and other entities (such as programmers trying to obtain carriage) in the video marketplace.⁶ NAB generally agreed with these comments and petitions expressing reservations about the competitive effects of the Adelphia transfer.⁷ NAB additionally pointed out that local broadcast stations that must deal in the marketplace with powerful, regionally concentrated cable operators have concerns (like other program providers) about gaining carriage for their programming, including their digital multicast programming. NAB Response at 4-8.

⁵ The Cable Act directs the FCC to ensure that no cable operator can impede “the flow of video programming from the video programmer to the consumer” and that “cable operators affiliated with video programmers do not favor such programmers in determining carriage on their cable systems or do not unreasonably restrict the flow of the video programming of such programmers to other video distributors.” 47 U.S.C. § 533(f)(2)(A) & (B).

⁶ *See, e.g.*, Comments of DIRECTV, Inc., MB Docket 05-192 at 8-29 (filed July 21, 2005); TCR Petition at 2-17; Comments of Echostar Satellite L.L.C., MB Docket 05-192 at 4-10 (filed July 21, 2005); Petition to Deny of America Channel LLC, MB Docket 05-192 at 18-44 (filed July 21, 2005); Comments of RCN Telecom Services, Inc., MB Docket 05-192 at 2-9 (filed July 21, 2005).

⁷ *See* Response of NAB to Comments and Petitions to Deny, MB Docket No. 05-192 (filed Aug. 5, 2005) (“NAB Response”).

The Commission should consider the analyses and evidence about regional concentration submitted in the Adelphia/Time Warner/Comcast proceeding in this broader ownership rulemaking, especially relevant material about the difficulties of programmers unaffiliated with cable operators obtaining carriage on cable systems. Such material would clearly be relevant to the Commission's inquiry in this proceeding as to "whether there is a relationship between ownership limits" and the "ability of independent programmers to gain carriage from cable operators." *Notice* at ¶ 60.

Beyond establishing new cable ownership limitations, the Commission could address its stated concerns about cable operators disfavoring unaffiliated programmers by promoting other ways for programmers unaffiliated with cable operators to reach viewers and thereby succeed in the marketplace. For example, the Commission could encourage the development of multicasting by television broadcast stations. Multicasting would substantially increase the need of stations for programming, thereby producing new opportunities for unaffiliated programmers, including those experiencing difficulties in obtaining cable carriage. Expanding opportunities for video programmers unaffiliated with cable operators would further Congress' goals in passing the Cable Act, and would "promot[e] the widespread dissemination of information from a multiplicity of sources," including those not under the control of cable operators.⁸ Especially given past difficulties in formulating sustainable horizontal or vertical ownership limits, the Commission should consider enhancing the ability of unaffiliated programming networks to

⁸ *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 189 (1997) (recognizing this as an important governmental interest).

reach viewers by means other than cable operators, such as through multicasting broadcast stations.⁹

II. Complaints About Retransmission Consent Are Repetitive, Unsubstantiated And Not Relevant To This Cable Ownership Proceeding.

In its comments, the American Cable Association (“ACA”) reiterates previously asserted complaints about broadcasters and retransmission consent.¹⁰ As an initial matter, NAB points out that these complaints have little or nothing to do with establishing judicially sustainable limits on the number of subscribers a cable operator may serve and the number of channels a cable operator may devote to its affiliated programming networks. The Commission should not complicate its already difficult task in this proceeding by attempting to address extraneous issues such as retransmission consent.

In any event, ACA’s complaints about the Commission’s well-established retransmission consent rules are either unsubstantiated or have already been refuted by NAB and a number of broadcasters in previous proceedings.¹¹ For example, ACA claims that its members “have no excess capacity” for carriage of programming because “[r]etransmission consent tying” has

⁹ If not in this proceeding, the Commission could address ways to promote multicasting in other pending proceedings. For instance, the Commission could reconsider its decision declining to require cable systems to carry the multicast programming of local broadcast stations. *See* Second Report and Order and First Order on Reconsideration, *Carriage of Digital Television Broadcast Signals*, 20 FCC Rcd 4516 (2005). One option would be to require cable systems to carry broadcast stations’ multicast streams for a limited period of time (such as five years) to provide incentives for broadcasters to devote the time and resources to develop new and innovative multicast programming streams.

¹⁰ *See* Comments of ACA at 1-6 (filed Aug. 9, 2005), citing ACA Petition for Rulemaking to Amend 47 C.F.R. §§ 76.64, 76.93 and 76.103, *Retransmission Consent, Network Non-Duplication, and Syndicated Exclusivity*, RM No. 11203 (filed March 2, 2005).

¹¹ *See, e.g.*, NAB, *et al.*, *Opposition to American Cable Association Petition for Rulemaking*, RM No. 11203 (filed April 18, 2005); NAB, *et al.*, *Reply to Comments to American Cable Association Petition for Rulemaking*, RM No. 11203 (filed May 3, 2005).

“fill[ed] up channel capacity,” even in digital tiers. ACA Comments at 3-4. These claims are wholly unsubstantiated – ACA provides no factual information whatsoever as to the number of channels on their members’ systems or the number or percentage of channels that are occupied by allegedly tied programming.

Complaints that some “programming conglomerates” can “*force* carriage of affiliated satellite programming” on cable operators “as a condition for granting retransmission consent for their local broadcast affiliates” also lack validity. ACA Comments at 3 (emphasis added). Under the retransmission consent regime, no cable operator is compelled to carry *any* channel, whether a local broadcast channel or an allegedly “tied” programming channel. And if a cable operator prefers not to carry any channel beyond a broadcaster’s local signal, cash alternatives are offered in retransmission consent negotiations, as even ACA admits.¹²

As NAB has previously pointed out, ACA members “want to have their cake and eat it too.”¹³ In one breath, ACA argues that broadcasters are unreasonable in requesting cash payment for carriage of their local signals; in the next, ACA asserts that negotiating for carriage of additional programming services is also unreasonable. *See* ACA Comments at 3-4.¹⁴ In essence, ACA is repeating its argument that retransmission consent is somehow inherently

¹² *See* ACA Comments at 4 (complaining about the alleged tying practices of a particular network affiliated broadcaster but conceding that the broadcaster has alternatively offered a per-subscriber monthly fee for its local signal).

¹³ NAB, *et al.*, Reply to Comments to American Cable Association Petition for Rulemaking, RM No. 11203 at 7 (filed May 3, 2005).

¹⁴ ACA’s complaints about broadcasters trying to obtain carriage for additional programming are also somewhat ironic, given that broadcasters began to negotiate for carriage of additional program streams in response to cable operators’ consistent refusal to pay cash for retransmission consent of local broadcast signals. *See* FCC, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* at ¶¶ 10, 35 (Sept. 8, 2005) (“*Retransmission Consent Report*”).

invalid because broadcasters should give their content to cable systems without compensation in any form. But there is no legal, factual or policy reason that broadcasters – unique among programming suppliers – should be singled out not to receive compensation for the programming provided to cable operators, especially given cable operators’ increasing competition with broadcasters for local advertising revenue. For these and other reasons previously set forth by NAB, ACA’s repetitive complaints about retransmission consent should be disregarded in this proceeding about ownership limits on cable operators.¹⁵ The fact that the existing retransmission consent regime was very recently found to benefit broadcasters, MVPDs and consumers further demonstrates the absence of any reason to consider ACA’s complaints here (or, indeed, in any other proceeding).¹⁶

¹⁵ In particular, NAB previously explained that the FCC’s existing rules limiting retransmission consent and the antitrust laws provide ACA members with more than sufficient protections against any alleged “tying” abuses. *See* NAB, *et al.*, Opposition to American Cable Association Petition for Rulemaking, RM No. 11203 at 20-21 (filed April 18, 2005).

¹⁶ *See Retransmission Consent Report* at ¶ 44 (the “retransmission consent process provides incentives” for broadcasters and MVPDs “to come to mutually beneficial arrangements,” and broadcasters and MVPDs both “benefit when carriage is arranged,” as do “consumers” who “benefit by having access” to broadcasters’ programming “via an MVPD”).

III. Conclusion

For the reasons stated above, the Commission should analyze the anti-competitive effects of regional (as well as national) concentration by cable operators, including any adverse effects on programming providers unaffiliated with the cable operators. Unsubstantiated and repetitive complaints about the Commission's well-established retransmission consent rules, however, are not relevant to the stated goal of this proceeding -- to formulate judicially "sustainable cable horizontal and vertical ownership limits." *Notice* at ¶ 16.

Respectfully submitted,

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